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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1973

No. 73-358

WILLIAM ALLEN JONES AND WIFE,
BOBBIE JONES

PETITIONERS

VS.

CREDIT BUREAU OF NASHVILLE,

RESPONDENT

REPLY BRIEF TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

H. FRANCIS STEWART
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THIRD NATIONAL BANK BUILDING
NASHVILLE, TENNESSEE 37219

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To the Honorable Warren E. Burger, Chief Justice of the United Sfates, and the Associate Justices of the Supreme Court of the United States:

Respondent, Credit Bureau of Nashville, prays that Petitioners' Writ of Certiorari be denied.

STATEMENT OF THE CASE

Respondent concurs with Petitioners' Statement of the Case which is contained in their "Summary Statement of the Matters Involved" except for the following:

1. On page 6 of the Petition, Petitioners state that "said Motion for a New Trial was denied without oral argument, the Court stating that it is 'of the opinion that oral argument would not be helpful. There is no rule of this Court requiring such a hearing'."

In the next paragraph Petitioners' state that they feel this was indicative of the Court's prejudicial attitude toward their case which pervaded and permeated the entire trial and denied them a fair and impartial trial:

Respondent contends that Petitioners' personal feelings are an inappropriate part of their Statement of the Case in that Supreme Court Rule No. 23, 1. (e) provides that the Statement of the Case is to contain the facts material to the consideration of the questions presented. Petitioners' personal feelings are certainly not facts material to the consideration of the questions presented.

2. On page 7 of Petitioners' Petition, they state that the United States Court of Appeals for the Sixth Circuit's decision in favor of the defendant is not in accord with applicable decisions relative to the District Court's words and actions in conducting the trial. Respondent again takes the position that Petitioners' opinions are not an appropriate part of the Statement of the case as provided by Supreme Court Rule No. 23 1. (e).

3. Petitioners failed to state in their Petition as is required by Supreme Court Rule No. 23, 1 (a) (ii) that their motion asking for an extension of time to petition for certiorari was granted by the Court of Appeals and an order was entered to that effect. (Appendix A)

JURISDICTION

Supreme Court Rule No. 19, 1. states in essence that a review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The rule then lists several basis of jurisdiction which indicate the character of reasons which will be considered.

Rule 19, 1 (a) deals with a state court deciding a federal question. This situation we do not have in the case at bar.

Rule 19, 1 (b) lists several criteria and reads as follows:

> (b) Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter; or has decided an important state or territorial question in a way in conflict with applicable state or territorial law; or has decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision.

Petitioners' Petition states two general grounds upon which they rely for allowance of the writ. The only possible sections of (b) above under which these grounds could fall are those dealing with an important question of federal law not yet settled by this Court and a departure from the accepted and usual course of judicial proceedings. Respondent will now state why it feels that this case does not warrant a review by this Court under either of those sections.

REPLY TO PETITIONERS REASONS FOR ALLOWANCE OF THE WRIT

1. Petitioners' first ground for allowance of the writ is that the Fair Credit Reporting Act, U.S.C. 1681-1681 (t), was misinterpreted and misconstrued by the District Court and the Court of Appeals.

Respondent contends that neither the District Court nor the Court of Appeals misinterpreted or misconstrued the act and further that they did not decide an important question of federal law which has not been, but should be, settled by this Court. What we have involved in the case at bar is merely a question of applying the Fair Credit Reporting Act to the facts involved.

In the original trial held in the U.S. District Court For The Middle District of Tennessee, Nashville Division, the Court presented three questions to the jury for their determination in

deciding whether or not Respondent, Nashville Credit Bureau, had violated the Fair Credit Reporting Act. The questions and the answers of the jury were as follows:

(1) Did the Plaintiffs properly identify themselves to the Defendant at the time they demanded information; Answer; Yes

(2) Did the Defendant neligently fail to disclose to Plaintiffs all information in its files on the Plaintiffs; Answer: No.

(3) Did the Defendant wilfully fail to disclose to Plaintiffs all information in its files; Answer: No (R. 176)

15 U.S.C. 1681 h (b) requires the consumer to properly identify himself before a consumer reporting agency is required to disclose any information whatsoever. Petitioners contend that the fact that the jury answered in the affirmative to the question of whether they properly identified themselves automatically places Respondent, Nashville Credit Bureau, in violation of the Fair Credit Reporting Act. Respondent contends that a closer analysis of the facts and statute proves to the contrary.

The Petitioners went to the office of the Credit Bureau of Nashville on or about Nov. 5, 1971, walked in and stated to the Bureau's employee, Mrs. Demonbreum, that they assumed she should know who they were and demanded written copies of

their credit reports. (R. 44-45, 119). Mr. Jones was told by Mrs. Demonbreum that the Bureau does not hand the individual a copy, but that the Bureau would exhibit the records and actually go over them with the Joneses and allow them to make any notations that they might wish. Mr. Jones rather peremptorily and in a high handed manner stated, "Young lady, I believe you are mistaken," and when Mrs. Demonbreum advised them she was not and asked whether she could help them in any other way, Mr. Jones further stated, "No thank you, we will take another route," and just walked right out the door with his wife, without giving Mrs. Demonbreum an opportunity to help him in the only way in which she could and was required to help him under the terms of the Fair Credit Reporting Act (R. 119, 121)

15 U.S.C. 1681 g (a) (1) states that every consumer reporting agency shall, upon request and proper identification of any consumer, clearly and accurately disclose to the consumer the nature and substance of all information (except medical information) in its files on the consumer at the time of the request.

The Act does not require that the consumer credit agency furnish written copies of its reports on files as Mr. Jones asked for, (R. 119), but merely requires that it *disclose* to the consumer the nature and substance of all information on the consumer in its files at the time. To interpret the term disclose to mean furnish a written copy would be unjustly stretching any known definition of the word. The record clearly reflects that the Credit Bureau offered to disclose all information it had on the Joneses when Mrs. Demonbreum told them that she could get their record and go over it with them and that they could make any notations they wanted to make. (R. 119)

At that time the Credit Bureau had fully complied with 15 U.S.C. 1681 (g) and the disclosure would have been made at that time had the Joneses not themselves refused to accept it and left stating they would take another route. (R. 119)

Based upon these facts and the law presented to it, the jury had no choice but to answer the questions of whether the Credit Bureau had negligently and/or wilfully failed to disclose the information in the negative. The facts had clearly shown the jury that the Bureau had offered to disclose the information but that the Joneses had refused to accept it. There was therefore no negligent or wilfull failure to disclose and a verdict was properly entered for the Credit Bureau despite the fact that the jury had found there to be a proper identification by the Joneses.

Resondent, thus, contends that the case at bar does not require the Supreme Court to interpret any portion of the Fair Credit Reporting Act. There was no important question of federal law decided in the U.S. District Court or the Court of Appeals. It was simply a factual question for the jury to decide if a proper identification had been made and if so whether the facts indicated that the Credit Bureau negligently or wilfully failed to disclose.

2. Petitioners second ground for allowance of the writ is that they were deprived of a fair and impartial trial and that the Court of Appeals in affirming the lower court's ruling so far sanctioned such a departure by a lower court, as to call for an exercise of the Supreme Court's power of supervision. Respondent disagrees.

The alleged prejudicial remarks by the Court were made in the Courtroom outside the hearing of the jury late in the afternoon of May 30, 1972, at the end of all the proof in the case when the Defendant moved for a directed verdict. No further proceedings were held on that day in the presence of the jury, Court being recessed until the next morning at which time it would hear arguments and instructions of the Court before beginning deliberations. It is not seriously contended by the Joneses that the trial judge made any comment heard directly by the jurors, but is contended that an article published in the Nashville Tennessean newspaper on the morning of May 31, 1972, was available to the jury, but the only proof offered of such was Exhibit No. 2 to the Joneses' Motion for a New Trial, which is an affidavit by Mrs. Annie Wade, a juror, which states that she "heard" the remarks of the judge on her way into Court "on the morning of May 31, 1972." The affidavit does not in any manner state how she heard the remarks of the judge or how these remarks may or may not have affected her. The remarks she apparently is referring to are remarks made in the Courtroom on the *day before* when the jury was not in the Courtroom but in the jury room where they could not hear anything said in the Courtroom by anyone (Appellant's Appendix to Court of Appeals brief, p. 29-32).

The only proof that any prejudicial remarks of the trial judge may have been available to the jury was by the Joneses' Exhibit No. 4 to their Motion for a New Trial, which is an affidavit by Mrs. Emma Chappel stating that she "knew of" the newspaper article, but this affidavit fails in all respects to state whether she even knew what the remarks of the judge were, or whether they influenced her in any manner (Appellant's Appendix, p. 29-32).

If the Joneses' counsel felt aggrieved in any manner by any alleged prejudicial comment by or conduct of the trial judge, he should have called the matter to the Court's attention so as to

give the Court an opportunity to conduct an inquiry as to whether such allegations had any basis in fact, and, if so, to take corrective action. *Faudree v. Iron City Sand & Gravel Company*, (CA Pa. 1963) 315 F 2d 647.

Improper remarks alleged to have been made by a trial judge during the process of the trial, even in the presence of the jury, cannot be reviewed where no objection or exception was taken to them at the trial. *Ketterbach v. U.S.* (9th Cir. 1913) 202 F. 377 at 385.

Since the trial judge has large discretion in ruling on the issue of prejudice resulting from reading by the jurors of news articles concerning the trial, the Joneses should have moved for a mistrial, offered what proof they had on the issue and given the trial Court an opportunity to inquire into the matter and make a determination whether any prejudicial error had occurred. Prejudice because of publicity will not be presumed. *U.S. v. Wilshire Oil Co. of Texas*, 282 F. Supp. 902, Affirmed 427 F 2d 969, cert. den. 91 S. Ct. 58, 400 U.S. 829, 27 L.Ed. 59 (D.C. Kan. 1968).

A party may not sit idly by and allow the trial Court to commit error, wait for a verdict and complain of the error only if the verdict is unfavorable. If counsel believed that prejudicial error had occurred, he should have moved for a mistrial and presented what evidence he had to indicate a mistrial was in order. *Skogen v. Dow Chemical Co.* (CA Minn. 1967) 375 F2d 692.

Although cautionary instructions will not always cure error, such an instruction is important in weighing all factors to determine whether action of the trial court adversely affected rights of the litigants. *Id.*

Where no objection was taken to alleged prejudicial remarks made by the court, the Court of Appeals could not consider such remarks on appeal though allegedly if the objection had been made to the remarks of the trial court, that court would have made further and possible more damaging statements to the jury. *Dowell, Inc. v. Jowers* (CA 5th 1950) 182 F2d 576.

A new trial may not be granted one who with knowledge of jurors' misconduct fails to make objections, and, when motion for a new trial is urged on the ground of the misconduct on the part of jurors, the movant must aver and show that he and his counsel were ignorant of the misconduct until after the return of the verdict. *U.S. v. Kansas City*, (CA Mo. 1946) 157 F2d 459.

The record in the instant case is devoid of any objection or exception made or taken to anything said by the trial judge or printed in the newspapers. Nor do the affidavits of the two jurors state that those jurors read the newspaper article. The Court said in *U.S. v. Carlucci*, 288 F2d 691 (3rd Cir.) cert. den. 366 U.S. 961, 81 S. Ct. 1920, 6 L. Ed. 2d 1253 (1961), in essence, that the doctrine of the U.S. Supreme Court in the *Marshall* opinion relied upon in the Joneses' Petition is not that juries must be sequestered every time there is a possibility that the trial may gain publicity in the newspapers which could be prejudicial to one of the parties. The questioned jurors in the *Carlucci* case admitted that they had seen certain newspaper stories, but upon being quizzed by the trial judge, certain of the jurors stated that they had only glanced at the headlines of the newspaper and did not read them to remember them. The Court refused to order a new trial.

Certainly, much more must be shown than the mere fact that one juror had "heard of" remarks of the trial judge and that another juror "knew of" the newspaper article before this case could be reversed.

Respondent thus contends that if there was any error made by the trial court, Petitioners failed to object to it at the proper time and cannot now come before the Supreme Court and say they were prejudiced. Further, we agree with the ruling of the Court of Appeals when it said that any comments made by the Federal Court were not prejudicial to the appellants (Petitioners Appendix p. 15). We contend that the Petitioners have failed to show that they were in any way prejudiced in that there is nothing in the record indicating that any juror was influenced by any comments made by the Federal Court or that any of them actually knew what the substance of any of the Court's comments was.

CONCLUSION

Petitioners have failed to state a sufficient reason for this Court to grant a writ of certiorari. As set out in the brief above there is no Federal law involved which needs interpretation nor is there any prejudice shown that resulted from any actions of the trial court. Any objection to the trial court's comments or actions should have been made at the time of the trial, not sometime thereafter. Petitioners indisputably failed to do this.

DAMAGES

Assuming the Credit Bureau was in violation of the Fair Credit Reporting Act, which Respondent strongly contends it was not, the Petitioners have failed to prove any damages whatsoever. There is nothing to indicate that their failure to obtain the information from the Credit Bureau, on Nov. 5, 1971 resulted in any harm or damage to them.

All that was involved in this case was a question of fact for the jury to decide, and after hearing all the evidence the jury found that the Credit Bureau did not negligently or wilfully fail to disclose information. The proof showed the the Bureau did in fact offer to disclose but that the Joneses left without giving it an opportunity. This proof is clearly consistent with the jury verdict and Petitioners have shown no reason for the jury's decision or the Court of Appeals' affirmation of that decision to be reviewed by this Court. This Court has consistently taken the position that it will accept the concurrent findings of the District Court and Circuit Court of Appeals on a question of fact if supported by substantial evidence and absent obvious and exceptional showing of error. *Graver Tank & Manufacturing Co. v. Lende Air Products Co.*, 69 S Ct 535, 336 U.S. 27, 93 L. Ed. 572; *Berenyi v. District Director, Immigration and Naturalization Service*, 87 S Ct 666, 385 U.S. 630, 17 L. Ed. 2d 656.

There not being a question before this Court which warrants the granting of a writ of certiorari, Respondent respectfully submits that the writ should be denied.

Respectfully submitted,

H. Francis Stewart

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

WILLIAM ALLEN JONES and wife, BOBBIE JONES, Appellants,	)	
VS.	)	No. 72-1923
CREDIT BUREAU OF NASHVILLE, Appellee	)	

MOTION

Comes the Appellants, WILLIAM ALLEN JONES and wife, BOBBIE JONES, and move this Honorable Court to grant an extension of its staying of the mandate in this case from August 11, 1973 to and including August 28, 1973. Appellants Counsel has almost completed the Writ of Certiorari and brief but needs the additional time requested to get them printed and filed with the Supreme Court of the United States.

/s/ C. Alex Meacham
Solicitor for Appellants

I hereby certify that I have this August 7, 1973, mailed to H. Francis Stewart, Attorney for Credit Bureau of Nashville a copy of this motion.

Motion Granted:

/s/ Anthony J. Celebrezze
U. S. Circuit Judge